MAR 2 9 2005

No. 04-514

IN THE

Supreme Court of the United States

RICKY BELL, WARDEN,
Petitioner,
v.

GREGORY THOMPSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

JOSHUA L. DRATEL
LAW OFFICES OF
JOSHUA L. DRATEL, P.C.
14 Wall Street, 28th Floor
New York, NY 10005
(212) 732-0707

PAUL R.Q. WOLFSON
Counsel of Record
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

STATEMENT 4

SUMMARY OF ARGUMENT 16

ARGUMENT 17

I. THE COURT OF APPEALS' DECISION TO REMAND RESPONDENT'S CASE FOR AN EVIDENTIARY HEARING WAS CORRECT 17

II. THE COURT OF APPEALS ACTED RESPONSIBLY AND REASONABLY IN RECONSIDERING ITS PRIOR DECISION BASED ON DR. SULTAN'S EVIDENCE 23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page(s)

Calderon v. *Thompson*, 523 U.S. 538 (1998) 25, 26
Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 24
California v. *Brown*, 479 U.S. 538 (1987) 24
Henslee v. *Union Planters National Bank & Trust Co.*, 335 U.S. 595 (1949) 25
Lankford v. *Idaho*, 500 U.S. 110 (1991) 24
Penry v. *Lynaugh*, 492 U.S. 302 (1989) 17, 22, 24
State v. *Thompson*, 768 S.W.2d 239 (Tenn. 1989) 4, 5, 6
Strickland v. *Washington*, 466 U.S. 668 (1984) ..... *passim*
Thompson v. *State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) ..... *passim*
Thompson v. *Tennessee*, 497 U.S. 1031 (1990) 6
Townsend v. *Sain*, 372 U.S. 293 (1963) 22
Wiggins v. *Smith*, 539 U.S. 510 (2003) 19, 20, 21, 22
Williams v. *Taylor*, 529 U.S. 420 (2000) 18, 22, 23
Williams v. *Taylor*, 529 U.S. 362 (2000) 19

STATUTES AND RULES

28 U.S.C. § 2254(d)(1) 18, 19, 22
28 U.S.C. § 2254(e)(2) 22
28 U.S.C. § 2254 Rule 6 9
28 U.S.C. § 2254 Rule 8 22

IN THE

Supreme Court of the United States

No. 04-514

RICKY BELL, WARDEN,
Petitioner,

v.

GREGORY THOMPSON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,200 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioner's consent to the filing of this brief is being filed together with this brief. Respondent previously filed its consent to all amicus briefs with the Clerk.

The NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, the NACDL files approximately 35 amicus curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. NACDL has a particular interest in this case because it presents issues concerning the effective assistance of counsel for indigent capital defendants, the fair administration of the death penalty, and courts' inherent powers to *sua sponte* correct important mistakes underlying their judgments to ensure justice. The court of appeals' decision to reconsider its original judgment in this death penalty case, due to errors it discovered itself without meaningful assistance from the parties' counsel, was a responsible and reasonable exercise of the judicial power that should be affirmed.

INTRODUCTION

Respondent has been sentenced to death. Ever since that sentence became final, respondent has maintained that his trial counsel provided constitutionally ineffective assistance by not fully investigating respondent's mental illness and thereby failing to uncover and present substantial mitigating evidence at his capital sentencing proceeding. The court of appeals' decision below orders the district court to conduct an evidentiary hearing on respondent's Sixth Amendment claim. Reviewing the full scope of deposition testimony and expert evidence gathered in this habeas proceeding, including evidence negligently omitted from the district court record, the court of appeals held that the summary judgment dismissal of respondent's habeas corpus petition was improper. The negligently omitted expert evi-

dence supports respondent on the critical factual issue in his case—whether he was mentally ill at the time of the offense.

The Warden (State) seeks respondent's execution without pause for even the evidentiary hearing ordered by the court of appeals, notwithstanding the fact that respondent's mental health at the time of the offense has yet to be examined in any court. The State argues in this Court that procedural rules should have blocked the court of appeals from taking the action that it did. The NACDL agrees with respondent's argument on the question presented, set forth in his merits brief, that the State's procedural argument regarding the issuance of the mandate is erroneous.

The NACDL respectfully submits this brief to defend the eminent reasonableness of the court of appeals' actions in the unique circumstances presented in this capital case. Upon discovering a factual error underlying both the district court's judgment and the court of appeals' previous judgment—namely, the conclusion that no evidence supported respondent's claim that he was mentally ill at the time of the offense—the panel below undertook the humbling exercise of admitting the mistake of its own prior ruling and issuing a new decision. The court of appeals recognized that while it was not required to reconsider its prior determination, this was a proper case for employing its discretion to do so. This careful and responsible exercise of official power should be praised, not condemned. The State disagrees, pressing a sporting theory of justice. The State argues that technical adherence to rules of procedure requires that the State emerge victorious and respondent be executed. But the court of appeals was not required to ignore evidence gathered in this very habeas proceeding that draws the reliability of respondent's death sentence into doubt. No rule of civilized jurisprudence should oblige judges to endorse through silence what they determine to be their own prior error in a case implicating a man's life.

STATEMENT

1. The State of Tennessee charged respondent with the January 1, 1985 murder of Brenda Lane. The state trial court appointed counsel to represent respondent. Both attorneys lacked experience defending capital cases. *See* Pet. App. 280-282; *State* v. *Thompson*, 768 S.W.2d 239, 245 (Tenn. 1989). Trial counsel suspected that respondent was mentally ill, and that he had been so at the time of the offense. Shortly after their appointment, counsel therefore filed a notice of insanity defense and motions seeking psychological, psychiatric, and neurological examinations of respondent to determine (1) whether he was competent at the time of the offense, and (2) whether he was competent to stand trial. In support of the motions, counsel filed an affidavit showing that respondent had suffered two concussions, one in a car accident while a teenager and the second more recently during his service in the Navy, when he was attacked by fellow servicemen. Pet. App. 121. The trial court granted respondent's motions on April 4, 1985, and ordered that respondent be evaluated for 30 days at a state facility. State psychologists conducted the evaluation and determined that respondent was competent. *Id.* at 121-122. To the extent that he showed signs of mental illness, the psychologists concluded that it reflected malingering by respondent. *Id.* at 129-130.

Trial counsel did not trust the state psychologists' finding and therefore requested funds from the trial court to obtain an independent psychiatric evaluation. Pet. App. 122.[2] The court held a hearing on the motion on July 10, 1985. *Id.* at 122 n.3. Meanwhile, three weeks earlier, on June 20, 1985,

[2] One of respondent's trial counsel later testified:

> I do want to say this and this is sincere. You know, we were required to send him for the evaluation, we felt, at the [state facility]. I have literally no faith in any conclusion that comes out of that place, then or now. I didn't have any faith in what came out of it then. I still thought something might be wrong but we didn't have any other place to go that we knew of.

Pet. App. 133-134.

respondent's trial counsel had filed a "Notice of Intent to Use Industrial Psychologist," stating that counsel planned to use testimony by psychologist Dr. George Copple at trial regarding "defendant's mental condition and abilities." *Id.* at 123 n.4, 231. An "industrial psychologist" specializes in human behavior in the workplace. *Id.* at 183. On July 29, 1985, the trial court granted respondent's request for funds and ordered the Tennessee courts to pay for counsel to obtain an independent psychiatric evaluation of respondent. *Id.* at 122-123.

Nevertheless, despite trial counsel's expressed doubts about the impartiality of the state psychologists' determination of respondent's competence, their suspicions about respondent's mental illness and knowledge of his head injuries, and their previously stated "need" for an independent psychiatric evaluation, trial counsel never used the court-ordered funds to obtain such an evaluation. Pet. App. 122-123 & n.3; *Thompson* v. *State*, 958 S.W.2d 156, 164 (Tenn. Crim. App. 1997). Counsel later offered the meager excuse "that they could not find a psychiatrist in Nashville since the psychiatrist they ordinarily used had moved out of state." Pet. App. 181. Counsel ultimately used the court-ordered funds merely to pay Dr. Copple, a psychologist whose recent expertise was evaluating social security applicants' vocational abilities and who trial counsel already had decided to use in his distinct capacity as an industrial psychologist at the time they sought the funds for a psychiatrist. *Id.* at 123 & n.4, 181-183, 188. Counsel apparently conducted no further investigation into respondent's mental illness.

Respondent offered no proof during the guilt phase of his trial, and the jury convicted him of first-degree murder. Pet. App. 123; 768 S.W.2d at 244. At the separate sentencing phase, trial counsel pursued a strategy "to emphasize positive attributes of [respondent] and show the jury that he could lead a productive life in prison." 958 S.W.2d at 167; *see also* Pet. App. 262-263. To that end, trial counsel called former acquaintances and family members who portrayed respondent as a "non-violent, cooperative, responsible young

person through his school years, until he joined the Navy." 768 S.W.2d at 244. Counsel also called Arlene Cajulao, respondent's girlfriend during his military service in Hawaii, who described respondent as "caring and sensitive." Pet. App. 124. Cajulao also testified that after respondent suffered a head injury "when three of his fellow service members attacked him with a crow bar," he began to act paranoid and to express unreasonable concern for Cajulao's and his own safety. *Id.*; *see also id.* at 193; 768 S.W.2d at 244.[3] Finally, Dr. Copple testified about respondent's "personality and capabilities for employment in prison." 768 S.W.2d at 244. On cross-examination, Dr. Copple admitted that, in his opinion, respondent did not suffer from any mental illness. Pet. App. 11.

The jury imposed the death penalty, and the trial court sentenced respondent to death. Pet. App. 130. Respondent's conviction and sentence were affirmed on direct appeal, *see* 768 S.W.2d 239, and this Court denied certiorari. *Thompson* v. *Tennessee*, 497 U.S. 1031 (1990).

2. In October 1990, represented by new counsel, respondent sought post-conviction relief in state court. Pet. App. 130-131 & n.9. Respondent argued, *inter alia*, that his trial counsel rendered constitutionally ineffective assistance by "fail[ing] to investigate adequately [respondent's] background and personal and medical history for the existence of mitigating evidence." *Id.* at 13; *see* 958 S.W.2d at 162.

Respondent filed a motion seeking funds to hire both a psychologist (or psychiatrist) and an investigator to assist in

---

[3] Specifically, Cajulao testified:

> He would get very paranoid. When we lived together, we had a fern tree growing on the side of the house; and he was constantly chopping the back side of it down. He would tell me when I came home to make sure nobody was standing behind there that might hurt me. If we heard noises in the evening, I would get up and find him walking around the house, thinking somebody might be there. He got very paranoid after that.

Pet. App. 263.

the preparation of his case. In support of the request, respondent filed an affidavit by Dr. Gillian Blair, a clinical psychologist. Pet. App. 131; *see* Opp. App. 35-39 (Blair affidavit). Dr. Blair explained that she had reviewed respondent's medical records since his conviction in 1985, which occurred approximately eight months after respondent's commission of the crime. The prison medical records documented respondent's "escalating psychiatric problems." *Id.* at 36. Respondent had attempted suicide and exhibited symptoms of "thought blocking, suspiciousness, inappropriate affect, hallucinations and agitation." *Id.* at 37. His mental status "rapidly deteriorated to include flight of ideas, marked tangentiality, grandiose delusions, thought projection, obsessive ideas and paranoia." *Id.* Three psychiatrists employed at the maximum security institution where respondent was incarcerated variously diagnosed him as having bipolar affective disorder, schizoaffective disorder, or schizophrenia, paranoid type. Respondent was taking Lithium to treat the bipolar disorder, Haldol to treat psychotic symptoms, and Cogentin to minimize the side-effects of the anti-psychotic medication. *Id.* In contrast to the psychologists who evaluated respondent prior to trial, a treating psychiatrist at the prison rejected the possibility of malingering because it failed to explain respondent's psychotic symptoms. *Id.*

Dr. Blair stated that a full psychological evaluation—including a complete social and medical history—would be necessary for her to render an opinion about respondent's condition, especially his mental condition at the time of the offense. She also set forth the approximate amount of money that would be needed to complete such an evaluation. Opp. App. 38-39. Importantly, Dr. Blair opined that if respondent were suffering from a neurological or psychological impairment, as his records appeared to indicate, "it is likely that some degree of such impairment would have existed at the time of the offense." *Id.* at 38; Pet. App. 132.

The state trial court denied respondent's request for funds. 958 S.W.2d at 170. In March 1995, the court held an evidentiary hearing at which both of respondent's trial coun-

sel testified. Pet. App. 132. Attorney Parsons admitted that counsel had been "aware of the possible 'significance' of [respondent's head] injuries but did not get all of the medical records." 958 S.W.2d at 164. Attorney Richardson acknowledged that they were not "as thorough as [they] should have been," and that "probably with some more digging," they could have identified respondent's mental illness. *Id.* Counsel testified that, having failed to hire a psychiatrist, they settled on their strategy of accentuating respondent's good qualities and avoiding any portrayal of respondent as mentally ill or a potentially harmful individual. *Id.* Dr. Blair also testified at the evidentiary hearing consistent with her prior affidavit. Pet. App. 135-137.

The trial court denied post-conviction relief, finding that respondent had "presented no proof of mental problems ... that would have been a defense to the charge, or that would constitute a shield against execution." Pet. App. 138. The Tennessee Court of Criminal Appeals affirmed. *See* 958 S.W.2d 156. The court recognized that counsel has "a greater duty of inquiry into a client's mental health ... for the penalty phase of a capital trial," and that "[e]ven when court-ordered examinations result in a finding of sanity, defense counsel should always attempt to determine whether psychological infirmities may be used as mitigating evidence." *Id.* at 164-165 (alterations, internal quotation marks, and citations omitted). Nonetheless, the court held that because respondent presented no evidence that he was mentally ill at the time of the offense, he failed to demonstrate prejudice from trial counsel's ineffective assistance. *Id.* at 165. For related reasons, the court found that trial counsel had made a reasonable tactical decision: "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.* The Tennessee Supreme Court denied discretionary review on October 20, 1997. Pet. App. 142.

3. a. On January 23, 1998, respondent sought habeas corpus relief in federal district court. The court granted respondent's motion seeking appointment of counsel to investigate, prepare, and file a petition on his behalf and appointed counsel from the Federal Defender Services of Eastern Tennessee, Inc. Pet. App. 16-17. Habeas counsel filed a petition for a writ of habeas corpus on June 12, 1998, in which respondent again alleged that his trial counsel had rendered constitutionally ineffective assistance. The petition claimed, *inter alia*, that counsel failed to perform a reasonable investigation of his background and mental health history, to secure adequate expert assistance regarding his mental health, to discover available evidence of his mental illness, and to investigate and challenge his competency at the time of the offense. *Id.* at 17-18. The district court granted respondent's request for discovery, finding that "if the facts are developed to show that [respondent's] mental health should have been introduced as mitigating evidence, [respondent] may be entitled to relief." *Id.* at 145; *see* 28 U.S.C. § 2254 Rule 6 ("Habeas Rule 6").

Respondent's habeas counsel obtained the necessary expert evidence on the critical issue in the case—whether respondent was mentally ill at the time of the offense. Respondent consulted two experts in the federal habeas proceeding. The first, Dr. Barry Crown, did not reach any conclusions regarding respondent's mental state at the time of the crime. Dr. Crown, a neuropsychologist, met with respondent in June 1998 and reviewed fourteen years' of mental health professionals' reports on respondent. Pet. App. 145-146. During a deposition conducted by the State on July 20, 1999, Dr. Crown testified that in his opinion respondent suffered from some form of organic brain damage, but that it was secondary to a schizoaffective disorder, bipolar type. *Id.* at 40, 45, 146. Dr. Crown acknowledged that he had not been asked to render an opinion on whether respondent was mentally ill at the time of the offense. *Id.* at 146. Dr. Crown did testify, however, that schizoaffective disorder tends to develop in late adolescence to early adulthood. *Id.* at 46. Respondent was 23 years old at the time of the crime. *Id.* at 11.

Respondent's second expert, Dr. Faye Sultan, a clinical psychologist, did offer an opinion on the critical issue in re-

spondent's case, concluding that he was mentally ill at the time of the offense. Dr. Sultan prepared a psychological report, dated July 22, 1999, and was deposed by the State on the same date. JA 11-20 (report), 21-87 (deposition).[4] In her report, Dr. Sultan explained that she had met with respondent three times, beginning in August 1998. She also reviewed respondent's extensive legal, military, medical, prison, and psychiatric/psychological records. The prison medical records documented that respondent "suffered from significant mental illness since at least the time of [his] incarceration in 1985." JA 14.

Dr. Sultan also based her opinions on interviews of respondent's grandmother and sister, and a discussion with an investigator who, in turn, interviewed respondent's former girlfriend, Cajulao. Respondent's grandmother, Maybelle Lamar, recalled that respondent "display[ed] significantly 'different' behavior" when he returned from his military service in Hawaii. Lamar observed that respondent was "angry," "sometimes sad," "star[ed] off into space," and "talk[ed] to himself." JA 16. Respondent's sister, Nora Jean Hall Wharton, described respondent's difficult childhood, which included abuse and neglect. For example, on one occasion during early childhood, respondent and his siblings were left for days to fend for themselves without money or food and, on another occasion, respondent and Wharton witnessed their biological father brutally beat and rape their mother, during which respondent screamed and sobbed uncontrollably. JA 17. Wharton also described respondent's childhood habit of "repeatedly banging his head against the wall," which respondent explained at the time as attempting to "knock the Devil out" of his head. JA 17-18. Like Lamar,

[4] Dr. Sultan had also submitted an earlier affidavit in support of an *ex parte* motion to enjoin the habeas proceedings due to respondent's incompetence. The necessity for that motion arose when respondent stopped receiving his medication. Dr. Sultan's affidavit in support of the *ex parte* motion did not address respondent's mental state at the time of the offense. Pet. App. 144 n.13.

Wharton also described respondent as behaving "significantly different" upon returning from his military service in Hawaii. JA 18. She noted that respondent "would become extremely angry, would cry and scream for a len[g]thy period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat." *Id.* At one point, Lamar and Wharton discussed bringing respondent to the psychiatric unit of the local hospital for treatment. *Id.* Finally, through the investigator, Dr. Sultan learned that respondent had several incidents of unexplained paranoid and aggressive behavior while living with Cajulao in Hawaii, including closing all the curtains in their house to avoid unidentified people who he said were "after" him or "looking" for him. JA 19.

Based on her investigation, Dr. Sultan concluded that respondent "experienced symptoms of major mental illness throughout his adult life," and that the available information suggested that respondent had "display[ed] significant signs of mental illness from the time he was a small child." JA 19. Dr. Sultan opined that respondent was most appropriately diagnosed as having schizoaffective disorder, bipolar type. "As is typical of this illness, symptoms became apparent in early adulthood." JA 20. In conclusion, Dr. Sultan found that respondent "was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced." *Id.* The report also noted that the information concerning respondent's early mental illness and social history was available at the time of his 1985 trial. *Id.*

The State deposed Dr. Sultan on July 22, 1999. JA 21-87. During the deposition, Dr. Sultan described her three interactions with respondent, as well as the various records and interviews on which she based her report. Dr. Sultan also recounted the tales she heard from respondent's sister about his childhood, including his self-injurious behavior of beating his head against the wall and his numerous and severe emotional outbursts as a child. JA 72-76. Dr. Sultan explained that together, these incidents were "early indicator[s] of a problem," and that in hindsight, they can properly

be seen as a precursor to respondent's later mental illness. JA 74. Dr. Sultan also described the reports of respondent's paranoid behavior during his military service and his increasingly strange behavior upon returning from Hawaii. JA 68, 78-79.

Dr. Sultan repeated and explained her diagnosis of schizoaffective disorder, bipolar type:

> [T]here is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of [respondent] documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur—lots of different kinds of delusions actually—auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.
>
> . . . .
>
> The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

JA 76-77. Finally, Dr. Sultan stated that respondent's mental illness would have substantially impaired his ability to conform his behavior to the requirements of the law, given his delusions, hallucinations, and his lack of control over his emotions. JA 79-80.

On February 17, 2000, the district court granted the State's motion for summary judgment and denied an evidentiary hearing. Pet. App. 202-332. The court based its decision primarily on the absence of evidence that respondent was mentally ill at the time of the offense. *Id.* at 270. In this respect, the Court noted in particular that Dr. Crown offered no opinion on respondent's mental health at the time of

the crime. *Id.* at 269. The court did not discuss Dr. Sultan's psychological report or deposition testimony because respondent's habeas counsel negligently failed to submit that evidence to the court as part of respondent's opposition to the State's motion for summary judgment. *Id.* at 56-57. More than a year after the district court's decision dismissing respondent's petition, habeas counsel recognized the omission and filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure in March 2001, attaching Dr. Sultan's report and deposition testimony. *Id.* at 55. The district court denied the motion as untimely and found habeas counsel's failure to file the evidence at an earlier date to be unreasonable and inexcusable. *Id.* at 78-79.[5]

b. In January 2003, a divided panel of the court of appeals affirmed. Pet. App. 117-201. The court of appeals, like the district court, relied principally on the absence of evidence that respondent was mentally ill at the time of the offense. Judge Suhrheinrich's lead opinion explained:

> Counsel has now had numerous opportunities via expert testimony to establish that [respondent] suffered from organic brain disease or mental illness at the time of the crime. And yet, at each opportunity, counsel fails to secure an answer to the critical issue of whether [respondent] was mentally ill at the time of the crime.

Id. at 160; *see also id.* at 118 ("Because we find that [respondent] has presented no evidence that he was mentally ill at the time of the crime or at trial, we AFFIRM the judgment of the district court."). This evidentiary shortcoming was relevant to both prongs of the ineffective-assistance inquiry under *Strickland* v. *Washington*, 466 U.S. 668 (1984). First,

---

[5] The Rule 60(b) motion explained the omission of Dr. Sultan's report and deposition testimony as having been caused by habeas counsel's extremely heavy capital habeas corpus caseload at the time of the summary judgment briefing. Habeas counsel stated that he had incorrectly assumed that the State had submitted Dr. Sultan's report and deposition testimony. Pet. App. 76-77.

"absent some evidence of organic brain damage or mental illness at the time of the crime, trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist." Pet. App. 160. Second, there could be no prejudice from any alleged ineffective assistance "because the jury was not deprived of any *actual evidence* of organicity or mental disease or defect at the time of the crime." *Id.* at 164 (emphasis in original). Finally, the absence of evidence on the critical issue also provided the basis for denying respondent an evidentiary hearing. Judge Suhrheinrich explained that the "fail[ure] to present any evidence demonstrating a genuine issue of material fact as to [respondent's] claim of incompetence at the time of the offense," notwithstanding the fact that the district court had afforded respondent discovery under Habeas Rule 6, demonstrated that there was no need for an evidentiary hearing. *Id.* at 170.

Judge Moore concurred in the result "solely on the basis of the facts in this case," where respondent had presented no "evidence that a more appropriate psychological or psychiatrist expert would have testified to [respondent's] mental illness or his deteriorating mental condition." Pet. App. 171. Judge Clay dissented, finding the state court had unreasonably applied *Strickland* in rejecting respondent's ineffective-assistance claim. *Id.* at 172-201. This Court denied certiorari on December 1, 2003, and denied a petition for rehearing on January 20, 2004. JA 91-92.

c. In June 2004, the court of appeals issued a new decision, vacating the district court's judgment and remanding for an evidentiary hearing on respondent's Sixth Amendment claim. Pet. App. 1-116. As Judge Suhrheinrich's opinion concurring in part and dissenting in part from the judgment explains, a statement by an intern in his chambers spurred Judge Suhrheinrich to thoroughly review the full certified record in the case. *Id.* at 8. As the court of appeals' docket reflected, the court recalled the certified record from the district court and received it in September 2003. *See* JA 7-8. In his review, Judge Suhrheinrich unearthed Dr. Sultan's report and deposition. Judge Moore, writing for herself and Judge Clay, recognized the "extremely probative" nature of the evidence and endorsed Judge Suhrheinrich's summary in his separate opinion of its importance to the critical issue in respondent's case. Pet. App. 2.

As Judge Suhrheinrich explained, the court of appeals' prior judgment had been based on a conclusion that no longer could be described as true: that there was no evidence that respondent was mentally ill at the time of the offense. *See* Pet. App. 7 ("Essential to our conclusion that [respondent] was not denied effective assistance of counsel ... was our finding that [respondent] has never submitted to any court any proof that he suffered from severe mental illness at the time of the crime.") (internal quotation marks and emphasis omitted). In particular, the court of appeals previously had found that trial counsel's performance was not deficient under *Strickland* "principally" because of this evidentiary shortcoming. *Id.* at 84. Dr. Sultan's report and testimony, however, spoke directly to the issue of respondent's mental illness in 1985. Based on that evidence, and the fact that "trial counsel here had more than sufficient leads to investigate further," Judge Suhrheinrich found that Dr. Sultan's testimony supported a finding of trial counsel's deficient performance. *Id.* at 87. The court of appeals' earlier opinion also had found that there could be no prejudice from trial counsel's alleged ineffective assistance absent some evidence that respondent actually was mentally ill at the time of the offense. Dr. Sultan's report and deposition provided that evidence, thereby also supporting a finding of prejudice. *Id.* at 88-89.

Given the indisputable importance of Dr. Sultan's report and deposition to the critical issue in respondent's habeas challenge, the court of appeals exercised its equitable power to supplement the record on appeal:

> Because the evidence here was apparently negligently omitted, because the evidence is so probative of [respondent's] mental state at the time of the crime, because there is no surprise to [the State] as

> it was [the State's] counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District Court record.

Pet. App. 5-6. Based on the expanded appellate record, the court of appeals remanded the case to the district court for an evidentiary hearing; it did not grant the habeas writ. The court observed that its reconsideration of its prior decision was proper because the mandate had not yet issued. *Id.* at 6. Judge Suhrheinrich added that he felt that it was "incumbent upon [him], as a judicial officer sworn to uphold the Constitution, and as authoring judge of the initial opinion, to reverse that ruling." *Id.* at 8. In remanding, the court of appeals stayed respondent's execution for 180 days to permit the district court to proceed with the evidentiary hearing. *Id.* at 6.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that respondent was entitled to an evidentiary hearing on the merits of his habeas petition. Once the court discovered Dr. Sultan's report and deposition, it wisely determined that the district court's summary judgment dismissal of respondent's petition could not stand. Dr. Sultan's evidence critically undermined the state and federal courts' prior conclusions concerning both factors of *Strickland* v. *Washington*, 466 U.S. 668 (1984). Dr. Sultan's report and deposition revealed the substantial mitigating evidence that trial counsel would have discovered had they simply used the funds obtained from the trial court to acquire an independent evaluation of respondent, rather than using those funds to pay their previously engaged industrial psychologist. Dr. Sultan's evidence also refutes the only basis on which the state and federal courts in respondent's case had found that trial counsel's failures did not prejudice respondent. Stated succinctly, Dr. Sultan's

conclusions confirm that there is evidence that respondent was mentally ill at the time of the offense.

II. Having determined that its prior judgment was erroneous, the court of appeals responsibly and reasonably reconsidered that judgment. Dr. Sultan's report and deposition concerned an important point in respondent's habeas challenge to his death sentence. Indeed, because the evidence supported a claim that trial counsel was deficient for failing to present important mitigation evidence to respondent's capital sentencing jury, the court of appeals had a substantial reason to doubt the reliability of respondent's death sentence. In these circumstances, and given this Court's Sixth and Eighth Amendment jurisprudence, the court of appeals' exercise of its discretion to reverse its own prior judgment was more than reasonable. *See, e.g. Strickland*, 466 U.S. at 685; *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989).

The method by which the court of appeals corrected its judgment was also reasonable. The court never indicated to the State that appellate proceedings were final and, in fact, the docket indicated precisely the opposite. In any event, the State's complaints that they were entitled to reasonably rely on the finality of the court of appeals' first judgment should be viewed with skepticism. The State's briefs in the court of appeals may have helped contribute to, and certainly did nothing to prevent, the court's original error.

ARGUMENT

I. THE COURT OF APPEALS' DECISION TO REMAND RESPONDENT'S CASE FOR AN EVIDENTIARY HEARING WAS CORRECT

Respondent convincingly argues in his merits brief that the court of appeals correctly exercised its inherent power to withhold the mandate and reconsider its prior decision. The NACDL agrees with respondent's argument on the procedural question before the Court.

As demonstrated here, when the court of appeals reconsidered the case, it also correctly determined the underlying

merits of respondent's appeal—namely, that respondent was entitled to an evidentiary hearing on his Sixth Amendment claim. Once Dr. Sultan's report and deposition came to light and were equitably added to the appellate record, the district court's summary judgment dismissal of respondent's habeas petition could no longer be justified. Together with evidence developed in state court, Dr. Sultan's evidence demonstrates the error of the state court's resolution under *Strickland* v. *Washington*, 466 U.S. 668 (1984), of respondent's allegations that (1) his trial counsel was ineffective in not fully investigating respondent's mental health, and (2) had trial counsel been effective, there is a reasonable probability that the outcome of respondent's capital sentencing proceeding would have been different. *See* 28 U.S.C. § 2254(d)(1).[6]

Respecting *Strickland*'s first prong, the Tennessee Court of Criminal Appeals determined that respondent's trial counsel was reasonably effective based principally on the absence of evidence that respondent was mentally ill at the time of the offense. *See* 958 S.W.2d at 165 ("counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion"). The existence of Dr. Sultan's report and deposition directly refutes the premise underlying that decision. As the court of appeals recognized, Dr. Sultan concluded that respondent was mentally ill at the time of the offense. Pet. App. 84.

Moreover, any finding that trial counsel made a reasonable tactical decision to present respondent's good qualities to the sentencing jury, and to intentionally avoid pursuing an allegedly unsupported mental-illness mitigation defense, is undercut by both Dr. Sultan's report and deposition (which demonstrate that a mental-illness mitigation defense was supported by expert psychological evidence) and the facts developed in state court. This Court's decision in *Wiggins* v. *Smith*, 539 U.S. 510, 522 (2003), which applied *Strickland* on habeas review under 28 U.S.C. § 2254(d)(1), clarifies the issue. This Court reaffirmed there:

> "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690-691). As in *Wiggins*, respondent's trial counsel here abandoned their investigation into respondent's mental health "at an unreasonable juncture," *id.* at 527, failing to employ the court-ordered funds to obtain the independent psychiatric evaluation of respondent that counsel previously had deemed necessary.

By abandoning their efforts to obtain such an evaluation, or to otherwise search for evidence regarding respondent's past mental health, trial counsel failed to fulfill their professional obligation to conduct a thorough investigation of respondent's background and mental health. *See Wiggins*, 539 U.S. at 522 (citing *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000)). According to the Tennessee Court of Criminal Appeals, counsel had a duty under Tennessee case law to continue their efforts, notwithstanding the state psychologists' determination that respondent was sane: "Even when court-ordered examinations result in a finding of sanity, defense counsel should always attempt to determine whether psychological infirmities may be used as mitigating evidence." 958 S.W.2d at 165; *cf. Wiggins*, 539 U.S. at 524 (finding that counsel's conduct fell below prevailing Maryland standards). Trial counsel made no such attempt here.

Trial counsel's own actions demonstrate that, based on what they knew at the time that the state psychologists rendered their determination on respondent's mental health, counsel themselves believed that further investigation into respondent's mental health was necessary. *See Wiggins*, 539

[6] This Court's decision in *Williams* v. *Taylor*, 529 U.S. 420, 434-435 (2000), confirms that evidence developed in a federal evidentiary hearing is relevant to the § 2254(d) inquiry.

U.S. at 525 (finding scope of counsel's investigation unreasonable "in light of what counsel actually discovered"). As Judge Suhrheinrich recounted, trial counsel knew that respondent exhibited signs of mental illness, that he was experiencing extreme mood changes, and that he had described hearing auditory hallucinations throughout his life. Pet. App. 87-88. Based on that knowledge, rather than accept the state psychologists' findings, respondent's counsel sought funds from the trial court to pay for an independent psychiatric evaluation of respondent. Counsel explained to the court that they "need[ed]" that evaluation to defend respondent. *Id.* at 122 n.3. The trial court agreed and granted counsel's request, thereby objectively confirming the reasonable necessity for trial counsel to continue their investigative efforts.

Yet, once counsel were granted the requested funds, they unreasonably failed to use them to obtain the needed independent psychiatric evaluation. Trial counsel feebly explained their failure at the post-conviction hearing only by saying that a Nashville psychiatrist they had used in the past had moved out of state. Pet. App. 181. Under *Strickland*, counsel's abandonment of their investigation into respondent's mental health at that juncture, and on such insubstantial grounds, was unreasonable. *See Wiggins*, 539 U.S. at 524 (finding counsel ineffective where, "[d]espite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report").

Trial counsel's conduct cannot alternatively be defended based on the unwarranted assumption that counsel hired Dr. Copple to provide the necessary independent evaluation of respondent. Counsel's own actions undercut any such finding. Respondent's counsel put Dr. Copple to work, and notified the trial court of their intent to use him in his distinct capacity as an industrial psychologist, *before* trial counsel even knew whether they would receive the funds they sought for the psychiatric evaluation—indeed, before counsel even orally argued their request to the trial court on July

10, 1985. *See* Pet. App. 123 n.4 (notice of intent), 126 (noting that Dr. Copple first met with respondent on May 15, 1985, "looking . . . at what things he might be capable of doing in a prison situation").

Finally, the reasonableness of trial counsel's highly questionable sentencing strategy is undercut by the case they actually presented to the sentencing jury. Counsel did not limit their defense to a portrayal of respondent's good qualities and his ability to thrive vocationally in prison, to the exclusion of evidence that might portray respondent as potentially mentally ill and dangerous. Rather, trial counsel affirmatively elicited testimony from respondent's former girlfriend, Cajulao, about the head injury respondent suffered during his military service and his subsequent increasingly bizarre, paranoid behavior. Pet. App. 124, 193. Trial counsel's development of this testimony is flatly inconsistent with any alleged tactical decision to avoid the portrayal of respondent before the sentencing jury as suffering from brain damage or as presenting a potential danger if released from prison. *See Wiggins*, 539 U.S. at 526 (finding record of sentencing proceedings to undercut counsel's alleged strategic judgment).

Dr. Sultan's report and deposition demonstrate that had trial counsel exercised their professional duty to fully investigate respondent's mental illness—and actually used the funds they obtained from the trial court to obtain an independent psychiatric evaluation, rather than to help pay their industrial psychologist—there was a wealth of mitigating evidence, all available in 1985, that they would have discovered. Had that evidence been presented to respondent's sentencing jury, there is "a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. All of the decisions in this case that rejected respondent's Sixth Amendment claim—both in state court and federal court—resolved the *Strickland* prejudice factor against respondent solely on the ground that no evidence existed that he was mentally ill at the time of the offense. *See* 958 S.W.2d at 165 (state appellate court);

Pet. App. 270 (federal district court); *id.* at 163-164, 170 (federal court of appeals' first decision). Dr. Sultan's report and deposition refute the premise of those decisions and provide powerful and compelling mitigation evidence of respondent's mental illness and social history. As this Court has recognized, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to ... mental problems, may be less culpable than defendants who have no such excuse." *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted); *see also Wiggins*, 539 U.S. at 535 (same, in context of addressing *Strickland* prejudice prong).

In sum, the court of appeals correctly held that Dr. Sultan's report and deposition, together with the facts developed in state court, provide support for respondent's argument that denial of his Sixth Amendment claim was contrary to or an unreasonable application of *Strickland*. *See* 28 U.S.C. § 2254(d)(1). The dismissal of respondent's petition on summary judgment was thus improper. It bears repeating that the court of appeals did not order the district court to grant respondent's habeas petition. Having reversed the summary judgment order, the court of appeals determined only that respondent's allegations and evidence justified an evidentiary hearing on his Sixth Amendment claim in the district court. *See* 28 U.S.C. § 2254 Rule 8. That holding is correct. *See, e.g., Townsend* v. *Sain*, 372 U.S. 293, 312-313 (1963).

The Antiterrorism and Effective Death Penalty Act (AEDPA) is no bar to an evidentiary hearing here. *See* Pet. 28-30. AEDPA precludes a hearing where a habeas applicant "has *failed to develop* the factual basis of a claim in State court proceedings," unless the applicant can satisfy certain requirements. 28 U.S.C. § 2254(e)(2) (emphasis added). Respondent did not, however, fail to develop the factual basis for his Sixth Amendment claim in state court. In *Williams* v. *Taylor*, 529 U.S. 420, 431-432 (2000), the Court clarified that the statutory phrase "failed to develop"

implies an absence of diligence on the habeas applicant's part. Respondent diligently sought funds from the state post-conviction court to develop the facts regarding his mental health at the time of the offense. Notwithstanding Dr. Blair's compelling affidavit, the state court denied that funding request, thereby blocking respondent's ability to conduct the necessary investigation and development of the facts. *See* pp. 6-7, *supra*. This Court confirmed in *Williams* that a habeas applicant who seeks funds in state court to investigate a claim, like respondent did here, is diligent for purposes of § 2254(e)(2). *See* 529 U.S. at 442-443 (respondent's request for funds in state court to investigate the facts underlying his constitutional claim was sufficient to avoid the § 2254(e)(2) bar).[7]

II. THE COURT OF APPEALS ACTED RESPONSIBLY AND REASONABLY IN RECONSIDERING ITS PRIOR DECISION BASED ON DR. SULTAN'S EVIDENCE

Having determined that the findings contained in Dr. Sultan's report and deposition critically undermined its original decision, the court of appeals reconsidered its prior judgment. The court recognized that the discovery of Dr. Sultan's evidence did not *require* the court to expand the appellate record and to reverse its earlier decision, but the court determined that this was a proper case in which to exercise its *discretion* to undertake such action. *See* Pet. App. 4-6 (majority), 114-115 (Suhrheinrich, J.). In the special cir-

[7] No "fail[ure] to develop" can properly be found based on the treatment of respondent's appeal in his state post-conviction proceedings. The parties briefed this issue below and the court of appeals implicitly resolved it in respondent's favor by ordering an evidentiary hearing. The State raised its § 2254(e)(2) argument again in its certiorari petition, but this Court denied review of the question. In any event, respondent did diligently appeal the trial court's denial of his motion for funds, but the state appellate court affirmed on a technical ground, retroactively imposing the procedural requirements of a later Tennessee Supreme Court decision. *See* 958 S.W.2d at 171 (applying "proof" requirements of *Owens* v. *State*, 908 S.W.2d 923 (Tenn. 1995), which was decided subsequent to respondent's motion for funds).

cumstances presented here, the court's discretionary decision to correct its prior determination was a reasonable and responsible exercise of the judicial power.

The negligently omitted evidence from Dr. Sultan did not concern merely a minor detail in a run-of-the-mill case. Rather, Dr. Sultan's report and deposition refuted the principal basis for both the district court's summary judgment order and the original court of appeals decision on respondent's Sixth Amendment claim. That ineffective-assistance claim, in turn, concerned trial counsel's failure to present important mitigating evidence about respondent's character to the capital sentencing jury. Trial counsel's deficient performance cast the reliability of respondent's death sentence into unacceptable doubt. This Court observed in *Strickland* that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results," 466 U.S. at 685, and that "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Id.* at 694.

Additionally, when an ineffective-assistance claim concerns a failure by an attorney to present important mitigation evidence to a capital sentencing jury, there is further reason to question the reliability and justice of the resulting sentence. The Eighth Amendment imposes a "heightened need for reliability in the determination that death is the appropriate punishment in a specific case," *Caldwell* v. *Mississippi*, 472 U.S. 320, 340 (1985) (internal quotation marks and citation omitted), so this Court has held that a jury's consideration of all relevant mitigating evidence "is a constitutionally indispensable part of the process of inflicting the penalty of death." *California* v. *Brown*, 479 U.S. 538, 541 (1987) (internal quotation marks and citation omitted). This is especially true of evidence that a capital defendant suffered from mental illness at the time he committed the crime. As noted,

"evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to ... mental problems, may be less culpable than defendants who have no such excuse." *Penry*, 492 U.S. at 319 (internal quotation marks and citation omitted).

These principles strongly support the court of appeals' exercise of its discretion to reconsider its prior decision here. The court surely was not required to ignore evidence developed in this proceeding that so substantially undermines the reliability of respondent's death sentence. "[T]he penalty of death is qualitatively different from a sentence of imprisonment .... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Lankford* v. *Idaho*, 500 U.S. 110, 125 n.21 (1991) (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality)). Given the differential treatment of the death penalty under the Eighth Amendment compared to other forms of criminal sentences, the court of appeals' decision to exercise its discretion in this case because it implicated a man's life is entirely proper. *See* Pet. App. 5 (majority), 116 (Suhrheinrich, J.).

The manner in which the court of appeals exercised its discretion to reconsider its prior judgment also was reasonable. The panel recognized that the judgment was undermined by Dr. Sultan's report and deposition, forthrightly admitted the resulting error in its own decision, and acted to correct it. This was not a case, like *Calderon* v. *Thompson*, 523 U.S. 538 (1998), where one three-judge panel is tardily reversed after the conclusion of all appellate proceedings by other members of the court. Indeed, there is no indication here that any judge of the court of appeals disagreed with the panel's determination to reconsider its prior judgment. Judges should not be condemned for recognizing and correcting mistakes in their own judgments. *Cf. Henslee* v. *Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never

comes, and so one ought not to reject it merely because it comes late.").

The court of appeals' actions also reflect care to avoid any unfair, adverse impact on the State's professed interest in relying on a final court judgment. At all times, it should have been clear that there was no final judgment on which to rely. For example, when the court determined to revisit the record, it apparently made that known on its public docket, which indicated to all who were reviewing it that approximately five months after the record had been returned to the district court it was recalled and refiled in the court of appeals. *See* JA 7-8. Similarly, after this Court denied respondent's petitions for certiorari and for rehearing, the court of appeals' docket (JA 8) revealed that no mandate had issued. *Compare Calderon*, 523 U.S. at 556 (noting that "when a federal court of appeals issues a mandate denying federal habeas relief ... the State is entitled to the assurance of finality"). Finally, the only available evidence indicates that, once the court of appeals discovered the error underlying its prior opinion, it worked diligently to correct that error in a new decision. *See* Pet. App. 8 (description of Judge Suhrheinrich's efforts). There is no evidence that the court acted in a dilatory fashion to await further state court action. *Compare Calderon*, 523 U.S. at 548 (court of appeals "considered whether to recall the mandate sooner, but had chosen to wait until the conclusion of [the respondent's] state-court proceedings").

Finally, the State should hardly be heard to complain about the Sixth Circuit's determination to thoroughly review the record and correct its earlier decision. Respondent's counsel properly bears the blame for failing to file Dr. Sultan's report and deposition in the district court. Nevertheless, the State's brief in the court of appeals hardly provided the assistance courts expect from attorneys (and especially government attorneys), who are after all officers of the court. The State argued in that brief:

> With regard to his claim of ineffective assistance of counsel, *despite the benefit of discovery in federal habeas proceedings and federal funding for mental health experts*, [respondent] presented no proof of his mental state at the time of the offense or at trial to support his contention that trial counsel was ineffective in failing to present proof regarding his mental state.

Final Brief of Respondent-Appellee at 40 (emphasis added). The State's careful use of the term "presented" makes the statement literally true, as respondent's habeas counsel failed to present Dr. Sultan's report or deposition in opposition to the State's summary judgment motion. But the implication of the State's argument—that respondent *could not* present such evidence "despite the benefit of discovery in federal habeas proceedings and federal funding for mental health experts"—is surely misleading. Having taken Dr. Sultan's deposition and viewed her report, the State knew that the "federal funding for mental health experts" did result in evidence of respondent's mental illness at the time of the offense. *See id.* at 43 & n. 12 (making same argument with same implication). Had the State wanted a secure final judgment, it could have advised either the district court or the court of appeals of Dr. Sultan's evidence and responded to it appropriately.

The State's argument in its brief appears to have had its intended effect on the court of appeals. Judge Suhrheinrich's original opinion in this case echoed the State's argument:

> [Respondent] ... failed to present any evidence demonstrating a genuine issue of material fact as to his claim of incompetence at the time of the offense and at trial. This is true even though the district court granted him further discovery under Habeas Rule 6.

Pet. App. 170. Had Judge Suhrheinrich known what the State did, though, it is clear that he would not have reached the same conclusion. He explained that upon discovering Dr. Sultan's report and deposition, he felt obliged as a judicial officer to reverse his prior ruling. *Id.* at 8. In these cir-

cumstances, the State should not be permitted to invoke its supposed interest in reliance on that decision's "finality."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JOSHUA L. DRATEL
LAW OFFICES OF
JOSHUA L. DRATEL, P.C.
14 Wall Street, 28th Floor
New York, NY 10005
(212) 732-0707

PAUL R.Q. WOLFSON
Counsel of Record
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

MARCH 2005